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88-425

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT A. LEVY,

PETITIONER,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
UNIVERSITY OF CALIFORNIA, DAVIS,
UNIVERSITY OF CALIFORNIA, BERKELEY,
PROFESSOR DOUGLAS McCOLM,
PROFESSOR WILLIAM KNOX,
EDWARD J. BLAKELY,
PROFESSOR JACK M. HOLLANDER, in their individual and official capacities, and
DOES I - XXX,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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Petitioner pro se

QUESTION PRESENTED FOR REVIEW

Whether petitioner, in a case filed in a State court under the federal Age Discrimination in Employment Act, presented sufficient evidence to give rise to a prima facie case of disparate treatment, precluding the grant of summary judgment against him.

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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION THREE

The petitioner, Robert A. Levy, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Three, entered on 31 March 1988.

OPINION BELOW

The Court of Appeal of the State of California, First Appellate District, Division 3, issued its opinion and judgment affirming respondents' motion for summary judgment denying petitioner's claims of age discrimination in employment on 31 March 1988, Levy v. Regents of the University of California, 199 Cal.App 3d 1334, 245 Cal.Rptr. 576 (Cal.App.1 Dist 1988). A copy of the Opinion is attached as Appendix A.

The Court denied petitioner's petition for rehearing on 29 April 1988. A copy of the Order denying rehearing is attached as Exhibit B.

JURISDICTION

On 22 June 1988, the Supreme Court of California entered its order denying review after judgment by the court of appeal. A copy of the Order denying

review is attached as Exhibit C.

The jurisdiction of this Court is invoked under Title 28, United State Code, Section 1257(3).[1]

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623(a):

> "...It shall be unlawful for an employer...(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals's age;..."

29 U.S.C. 626(c):

> (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.....
> (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief

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[1]No other petitioner is involved in this petition.

is sought by any party in such action.

2. Age Discrimination in Employment Act, interpretation by Code of Federal Regulations, 29 C.F.R. 1625.2(a):

> It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals within the 40-70 age bracket. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.

3. Rule 437c(c), California Code of Civil Procedure:

> "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other

inferences or evidence, which raise a triable issue as to any material fact.

4. Rule 29, California Rules of Court.

Grounds for Review in the Supreme Court.

(a) [Grounds] Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; ....
(b) [Limitations] As a matter of policy, on petition for review the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing.....

STATEMENT OF THE CASE

On March 31, 1988, the Court of Appeal of the State of California affirmed the summary judgment of the Superior Court of Alameda County, California, denying petitioner's two claims of age discrimination in employment against the

Regents of the University of California, the University of California, Davis, the University of California, Berkeley, and four individual defendants. The basis for the court's opinion was that petitioner had failed to establish a prima facie case of disparate treatment (or disparate impact) in either of his claims. In reaching this conclusion, the opinion ignored material facts, construed the evidence in favor of the movant (respondents), and considered matters raised for the first time on appeal. Pursuant to Rule 29, California Rules of Court, petitioner called the court's attention to these errors in a timely filed petition for rehearing in the Court of Appeal, which was denied on April 29, 1988. Petitioner then filed a timely petition for review in the Supreme Court of California, which was denied in an

Order Denying Review filed and entered June 22, 1988. The omissions and errors in the opinion of the Court of Appeals are set forth as follows:

1. THE TEMPORARY LECTURER POSITION AT UC DAVIS

a. The opinion ignored the fact that petitioner had been in continual contact with administrative officials at UC Davis since January, 1977, when he first approached the chairman of the physics department, Dr. Douglas McColm, for a faculty position[2], and that until the conversation with Dr. McColm in May of 1980, they had never told petitioner of the existence of temporary lecturer positions.

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[2]Respondents had misrepresented this matter in their Brief, and petitioner in his Reply Brief had specifically called the court's attention, in a page reference, to the record of a memorandum dated June 28, 1979, concerning his interest in employment.

b. The opinion ignored the fact that three named individuals, Michael Madison, age 30, J. McGrath, age 42, and J. Romero, age 42, none of whom had any apparent teaching experience, were appointed for the first time in January, 1981, to temporary lecturer positions, and then dropped from the rolls at the end of the quarter.

c. The opinion ignored the inferences deducible from the promise of a position made to petitioner by the incoming department chairman Dr. William Knox, namely that the promise relieved petitioner of the need to follow up on his application.

d. The opinion construed the visit by petitioner's daughter to the department chairman in December, 1980, in favor of the movant.

2. THE DEPUTY DIRECTOR POSITION AT UC BERKELEY

a. The opinion ignored the fact that the announcement of the position took place on May 8, 1981, only three weeks before the deadline for submission of applications[3] with letters of reference.

b. The opinion ignored the fact that petitioner had been seeking employment with the University of California continually over the previous fifteen years.

c. The opinion ignored the evidence that the selectee for the position failed to meet the objective criteria stated in the announcement.

d. The opinion construed petitioner's resume in favor of the movant, placing the burden of proof in the summary judgment proceedings on the non-

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[3]Copies of the announcement (E.1-2), petitioner's letter of application (E.3-4), and petitioner's resume (E.5-8) are attached as Appendix E.

movant (petitioner).

e. The opinion ignored the evidence that the selection process was a charade, there being no intention to hire anyone other than the selectee.

f. For purposes of evaluation, respondent regarded petitioner's application as complete, but the opinion construed this fact in favor of the movant.

g. The opinion concluded that since the selectee was 43 years old and thus within the protected age group, petitioner was precluded from establishing a prima facie case of discrimination.

h. The opinion considered matters relating to petitioner's qualifications even though this issue was not raised in the summary judgment proceedings.

i. The opinion drew conclusions unfavorable to non-movant (petitioner) on

matters in which the record was silent, relating to his qualifications.

j. The opinion ignored the fact that petitioner's qualifications met the objective criteria for the job.

3. RELATIVE TO BOTH CLAIMS

The opinion ignored direct evidence of discrimination, including statements from two officials indicating prejudice toward an older applicant, and from other employees relating to discriminatory hiring practices against older applicants.

STAGE WHERE FEDERAL QUESTION WAS RAISED

The federal Age Discrimination in Employment Act was first raised in plaintiff's original complaint, filed in Alameda County Superior Court on November 10, 1982. This statute, along with the California Fair Employment and Housing Act, was the basis for the complaint, and it was invoked at every stage of the

proceedings, through discovery, summary judgment, and appeal. The trial court granted summary judgment to respondents on grounds that petitioner could not show that respondents' articulated reasons for not hiring him were pretextual. The California Court of Appeal affirmed this decision, on grounds that petitioner failed to establish a prima facie case, as did the California Supreme Court, by implication, when it denied review.

Specific sub-questions were raised as follows:

1. The question of whether or not petitioner completed the applications for the positions was raised first in the summary judgment proceedings.

2. The question of petitioner's qualification for the deputy director position was first raised in respondents' brief in the court of appeal.

3. The relative age question was first raised in the opinion of the court of appeal.

4. The question of judicial bias in academic discrimination cases was first raised in petitioner's petition for rehearing in the court of appeal, and was based on statements made by the trial judge in the summary judgment proceedings.

REASONS FOR GRANTING THE WRIT

In a case filed in State court under the federal Age Discrimination and Employment Act, a State appellate court reviewing a summary judgment against claimant may not 1) disregard material facts tending to show that a genuine issue of fact exists, 2) construe the evidence in favor of the moving party, or 3) consider factual issues raised for the first time on appeal, in affirming the summary judgment, nor may it decide a

federal question in conflict with that of federal statutes and federal courts of appeal.

If summary judgment is granted against a plaintiff in a case involving the federal Age Discrimination in Employment Act, when material factual issues exist, the judgment amounts to a violation of the Act, since 29 U.S.C. 626(c)(2) provides for a trial by jury of issues of fact. Moreover, state court questions of burden of proof may amount to a federal question when substantive rights under a federal statute are involved, Hill v. Smith, Mass, 1923, 43 S.Ct 219, 260 U.S. 592, 67 L.Ed. 419. The argument under this question thus comes down to a showing that material factual issues exist.

In addition, the court of appeal decided a question of law in conflict with

settled regulatory and case law authority, when it ruled that a plaintiff may make a claim of age discrimination only when his replacement's age is outside the protected age limits.

1. THE TEMPORARY LECTURER POSITION

In the Opinion of the Court of Appeal, petitioner failed to complete the application process and thus was unable to establish a prima facie case of discrimination.

The Opinion gives a misleading picture of the circumstances surrounding petitioner's application for the temporary lecturer position at UC Davis:

> "...In the spring of 1980, approximately 11 years after appellant left the University of Cincinnati, appellant's daughter, then a student at the University of California, Davis campus, approached the chairman of that schools's physics department, Dr. Douglas McColm, and asked him to consider appellant for employment...."

In fact, petitioner had been in continual

contact with Dr. McColm and other administrative officials at UC Davis since 1977[4]. Respondents had misrepresented this situation in their Brief, and petitioner made a point of calling the court's attention to it in his Reply Brief.

The Opinion seized on petitioner's use of the word "might" in his conversations with Professors McColm and Knox. But regardless of his language, petitioner was interested enough in the position to prepare and present a one-hour seminar talk at the UC Davis physics department, as requested by Professor McColm. He did everything he was asked to do. When construed in the most favorable light toward petitioner, it can be inferred that his action (preparing and presenting a talk) speaks louder than his

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[4]See footnote 5 (infra)

words ("might be interested") in "informing the university that he had made a definite decision that he wished to be appointed to the position".

Moreover, the use of the word "might" has nothing to do with petitioner's completing his application; it is related to whether or not he would accept the position. Completing an application does not require an advance commitment that the applicant will accept the position. Otherwise, how could an individual apply for more than one position at a time? Construing petitioner's use of the word "might" in terms most favorable to him, it can be inferred that he was referring to whether or not he would accept the position.

Furthermore, petitioner's affidavit states that the incoming chairman, respondent Knox, promised him a position

in January, 1981[5]. Construing this evidence most favorably toward petitioner, it can be inferred that respondent Knox (the University's representative), in making the promise, believed petitioner did wish to be appointed to the position.

The statement in the Opinion that, "Knowing these facts, petitioner

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[5]A good example of the bias in the Opinion is the way it treats the promise made by respondent Knox: "Appellant claims that Knox 'promised' him the position on the spot, before appellant had given his lecture and prior to Knox becoming chairman of the department". This quotation is essentially lifted from respondents' brief: "Plaintiff claims that Dr. Knox 'promised' him the position on the spot -- before plaintiff gave his lecture or Dr. McColm had an opportunity to consider whether other more suitable candidates might be available".

In fact, petitioner had been known to the administration at UC Davis for three years prior to his meeting with Knox on June 13, 1980. Knox became department chairman on July 1, 1980, and the position promised to petitioner did not begin until January 1, 1981, so it is irrelevant that Knox was not yet chairman and that McColm didn't have an opportunity to consider other candidates.

nevertheless failed to personally follow up on this position until January 1981, an untimely action by anyone's definition" ignores the promise of a position made by Knox to petitioner.

In making the promise, it can be inferred that respondent Knox in his mind needed nothing further from petitioner by way of application. It can further be inferred that petitioner in his mind would have no reason to follow up, especially since McColm and Knox told petitioner that he would be hearing from them subsequently about the position.

Therefore the visit by petitioner's daughter to Dr. Knox in December, 1980, need not be construed as "completion of the application process by appellant", since the process had already been completed. It was however a follow-up, and it serves to refute respondent Knox's

contention that he forgot about petitioner's application.

Nor does the record show conclusively that her visit was untimely[e], and thus it may be construed as being timely for purposes of a summary judgment proceeding.

Moreover, the need to "follow up" on an application introduces something new into the concept of completing an application process--since when does an applicant need to follow up--especially when he thinks he has a promise of a position, and when the employer tells him that he (the employer) will contact him?

The court's opinion refers extensively to Ibarbia v. Regents of the

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[e]December 22, 1980, fell on Monday. The Christmas vacation would have begun not later than Friday, December 19, so it is at least a factual issue as to whether Carolyn's visit took place prior to December 22.

University of California, 191 Cal.App.3d 1318 (1987), to show the importance of completing the application process, and attempts to find parallels between that case and the instant case. But the cases are not parallel; the basic distinction is that in Ibarbia, as in other cases where plaintiff failed to complete the application process (See for example Tagupa v. Board of Directors, 633 F.2d 1309, 1311 (1980)), the plaintiff failed to act on the employer's request. The case law seems to be saying that in order for there to be a failure to complete the application, the ball must be in plaintiff's court, and he must fail to hit it back. In this claim (and in the deputy directorship discussed infra) the ball was in the employer's court, and it stayed there. There is no authority to the effect that a job applicant is required to

"follow up" on an application.

Construction of the evidence in favor of the movant in a summary judgment proceeding is not permitted, as the case cited in the court's opinion, Empire West v. Southern California Gas Co., 12 Cal.3d 805, 808 (1974) makes clear:

> "...In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion...."

The statement in the Opinion: "allegations made by appellant.....that the person hired for the position was less qualified than he, that during the period in question the university had more than one temporary lecturer opening -- are purely speculative and not borne out by the evidence..." is unfounded. To the contrary, petitioner cited three

individuals, Michael Madison, age 30, J. McGrath, age 42, and J. Romero, age 42, none of whom had any apparent prior teaching experience, all of whom were younger than he and all of whom were hired for the first time in January, 1981, to fill temporary lecturer positions at the UC Davis Physics department. All three of these individuals were dropped from the rolls after one quarter. Construing the evidence favorably toward petitioner, it can be inferred that respondent was indeed attempting to "camouflage its real discriminatory motive in not hiring him".

2. THE DEPUTY DIRECTOR POSITION

a. THE APPLICATION

Again the opinion of the Court of Appeal concluded that petitioner failed to complete the application process, this time because he failed to include letters of reference with his resume.

The Opinion's analysis in the Berkeley case (deputy director position) reflects a similar bias in favor of respondents, contrary to the standards governing summary judgment:

> "....In May 1981, appellant saw an advertisement in Science magazine advertising the position of deputy director...."

The implication in this statement is that in May, petitioner (appellant) saw an advertisement that had appeared substantially earlier. The Opinion overlooks the crucial fact that the advertisement appeared in the May 8, 1981, issue of Science magazine, thereby leaving applicants only three weeks to comply with the requirement of getting resumes and three letters of recommendation submitted by June 1. Although petitioner was

questioned on this point at oral argument[7] by the Opinion's author, the Opinion retained the implication that the position had been announced earlier.

Referring to petitioner's letter of application to Dr. Hollander, the Opinion adds, "....Nor was it his intention to supply them (letters of recommendation) at a later time absent another request by the university." Emphasis added. This is hardly a favorable construction of petitioner's letter.

Furthermore, petitioner's resume, sent with his application, includes the names of three references, from which, liberally construed, it can be inferred

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[7]Petitioner responded that there was nothing in the record to indicate an earlier announcement, and that he knew of no earlier announcement. Absent any evidence to the contrary, it must be assumed that the position was announced on May 8, 1981. Furthermore, respondents never claimed that the position was announced earlier.

that petitioner did in fact satisfy the "requirement" for letters of recommendation, in the absence of a subsequent request from respondents.

In addition, in May, 1981, petitioner was understandably discouraged after nearly fifteen years of continually applying to this institution for employment without even getting a part-time temporary lectureship, about which he had been deceived few months earlier after having been promised a position.

Construing the evidence most favorably toward petitioner, it can be inferred that he did all that could reasonably have been expected of him under the circumstances. He explained in his application why he could not get the letters in by the deadline and said he would try to comply if the employer was interested in his application. It is

reasonable to construe the evidence as requiring the university to make some kind of response, such as a simple note to the effect that petitioner could have a few more days to get the letters submitted (see Ibarbia supra), before petitioner should be held responsible for not completing his application. This is particularly true in view of the undisputed fact that the selectee, Dr. Lederer, had more than three months to get his act together. However, the university did not even so much as acknowledge petitioner's application.

Nor is the Opinion's statement that "neither does the fact that the university considered petitioner's application in spite of these deficiencies, lend support to his position" warranted. Nearly half the applications had no letters of recommendation, and the university

established a category for incomplete applications (the XXX category), into which petitioner's application was not placed[a]. If an employer regards an application as complete for purposes of evaluation and comparison (without advising the applicant of any deficiency), it should not be able to later assert that the application was incomplete.

i. Chilling Effect of Past Discrimination

In its opinion the court ignored the fact that petitioner had been attempting continuously over the preceding fifteen years to obtain a position with the University of California and that he might be understandably discouraged after

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[a]The fact that the employer evaluated petitioner's application in a deficient state (without advising him to cure the deficiency) is itself an indication of discrimination, since it denied petitioner the opportunity to correct the deficiency and compete effectively with the other applicants.

such a long string of unsuccessful applications, including the recent occasion at UC Davis.

In International Brotherhood of Teamsters v. United States, 431 U.S. 324, 363-367, this court recognized that circumstances of this nature may excuse the requirement that a plaintiff apply for the position. Pearson v. Furnco Construction Co, 563 F 2d 815, 818 (1977), also recognized such circumstances when it ruled that plaintiffs who had been denied employment in the past from the same employer and had made the employer aware of their availability should not be required to apply for the job. Tagupa v. Board of Directors, 633 F 2d 1309, 1312 (1980), citing Teamsters, supra, noted that discouragement could excuse a plaintiff from applying for a position.

In the instant case, if there were

any minor deficiencies in petitioner's application (in either the deputy director claim or the temporary lecturer claim), the fact that he had been attempting unsuccessfully for fifteen years to obtain employment from this employer should excuse such deficiencies.

b. QUALIFICATIONS

The opinion of the Court of Appeal also concluded that petitioner did not have the qualifications for the position, based primarily on the fact that "'experience in management of research programs and with information systems' was listed as 'very desirable" in the announcement and that "nowhere in appellant's resume is such experience noted." (Emphasis added).

The issue of petitioner's qualifications was not explicitly raised in the summary judgment proceedings in the

trial court. Respondents should not have been permitted to raise this issue on appeal, when petitioner had no chance to present controverting evidence, G.D. Holland Construction Co. v. City of Marysville, 12 Cal App 3d 989 997 (1970):

> ".....In reviewing a summary judgment the appellate court considers only the facts before the trial court, disregarding new allegations urged on appeal."

Respondents had the burden, in the summary judgment proceedings, of showing that petitioner's qualifications were deficient. This they did not do. It is not enough to rely on the silence of the record[9]. The burden of proof in a summary judgment proceeding is on the movant,

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[9]In Tagupa for example, the employer wrote a letter to the applicant asking him to address "specific things requested in the job description", to which the applicant then failed to respond adequately. In the instant case, respondent gave petitioner no opportunity for response.

Segura v. Brundage, 153 Cal. Rptr. 777, 91 Cal.App.3d 19 (1979):

> "...There is nothing in the statute which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, the moving party must generally negative the matters which the resisting party would have to prove at the trial..."

Petitioner also pointed out that his qualifications met the objective criteria for the position, which was all that was needed to establish a prima facie case, Foster v. Arcata Associates, 772 F 2d 1453, 1460:

> "....In the context of the prima facie case of discrimination on motion for summary judgment, however, (plaintiff) was required to produce evidence sufficient to indicate a genuine factual dispute about whether (he) possessed the minimum qualifications for the job..." Emphasis added.

Petitioner also introduced evidence that the selectee failed to meet the objective criteria for the position, which

was ignored by the court of appeal. The opinion hardly discussed petitioner's qualifications at all[10]; instead it focused on those of the selectee, which are irrelevant at the prima facie stage, and, which is even more irrelevant, on the qualifications of two other candidates who were not selected.

c. RELATIVE AGE REQUIREMENT

The opinion of the Court of Appeal also set forth the doctrine that among the elements of a prima facie case under the ADEA, "....another person of similar qualifications generally outside the

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[10]His election as Fellow of the American Physical Society, the publication of his textbook, and his contributions since becoming unemployed (encyclopedia articles, solar energy work, and investigations of fraudulent mileage devices) are ignored. The conclusion in the Opinion that "it is beyond question that Dr. Lederer's qualifications were superior in all respects to those of appellant" can be inferred only if the evidence is ignored.

protected age group, received the position", citing Fugate v. Allied Corp., 582 F.Supp. 780, 783 (1984). Since the selectee was 43 years old when hired[11], the court concluded that petitioner could not make out a prima facie case.

The Code of Federal Regulations, 29 C.F.R. 1625.2(a) makes it clear that this conclusion is erroneous. Moreover, Fugate does not support the doctrine either:

> "....There is no logical reason why an inference of discrimination cannot be drawn when the replacement is younger but not outside the protected group, particularly in view of the fact that the protected group spans two generations....."

If this conclusion of the court's opinion stands, a large fraction of workers in the protected age group will lose their protection under the ADEA, particularly in the State of California.

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[11]Petitioner was born on November 15, 1926, and thus was 54 years old in May, 1981, eleven years older than selectee.

d. THE ENTIRE SELECTION PROCESS WAS A SHAM

The court of appeal also ignored evidence presented by petitioner that the entire selection process for the position was a charade.

The selectee Dr. Lederer was actually hired in January, 1981, as "acting" deputy director. He knew from the beginning that there would be an announcement for the position. The deadline for submitting applications was established at June 1, 1981, but the university delayed announcing the position until May 8, 1981, making it difficult for all applicants other than Dr. Lederer to complete the process of application[12]. Dr. Lederer's service as "acting" deputy director was considered a factor in the decision to appoint him. If this evidence

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[12]Nearly half the applicants failed to include letters of reference with their applications.

is construed in petitioner's favor, it can be inferred that from the beginning respondent had no intention of appointing anyone other than Dr. Lederer to the position. It can also be inferred that the qualifications for the position were tailored to fit Dr. Lederer's background, making any discrepancy between the announced qualifications and those of the petitioner meaningless as far as the requirements of his prima facie case are concerned.

e. DIRECT EVIDENCE OF DISCRIMINATION

Petitioner introduced statements by Dr. McColm and Dr. Mayhew indicating a personal bias against older applicants. He also presented statements by Dr. Blakely, Dr. Kip, and Dr. Kittel indicating an institutional bias against older applicants.

Except for a passing reference to

the letter from Dr. Blakely, the opinion ignored this material and its significance. It also ignored petitioner's refutation of respondents' argument that such evidence is inadmissible or otherwise incompetent[13].

If this material is construed in petitioner's favor, it alone would establish a claim of disparate treatment against respondents.

JUDICIAL BIAS IN ACADEMIC DISCRIMINATION CASES

At the hearing on defendants' motion for summary judgment, the court appeared to single out academic cases as particularly inappropriate for judicial action. Again at the hearing on plaintiff's motion for reconsideration the court made similar observations: "...it's a rather rare case

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[13]The trial court overruled respondents' objections to the admissibility of this evidence.

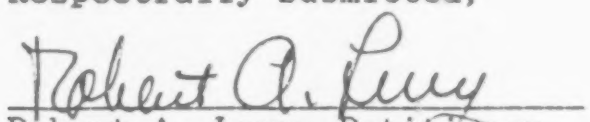
where the court is going to second-guess what has been taken on in the academic world..." This apparent bias against academic litigants is the subject of a book entitled Academics in Court: The Consequences of Faculty Discrimination Litigation, by G.R. La Noue and B.A. Lee, University of Michigan Press, 1987, which paints a gloomy picture of the consequences of academic discrimination litigation. The misperception of summary judgment law evident in the Opinion of the California Court of Appeal may reflect a bias of this nature, which should be corrected through a review by this Court.

CONCLUSION

For the foregoing reasons, and because the opinion would have a severely adverse effect on ADEA protections, petitioner Robert A. Levy respectfully requests that a writ of certiorari issue

to review the judgment of the Court of Appeal of the State of California, which affirmed the summary judgment against petitioner.

Respectfully submitted,



Robert A. Levy, Petitioner
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CERTIFIED FOR PARTIAL PUBLICATION[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

A036046
(Super. Ct. No. 565695-8
County of Alameda)

F I L E D
MARCH 31, 1988
COURT OF APPEAL
FIRST APP. DIST
RON D. BARROW

ROBERT A. LEVY,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,

Defendants and Respondents.

Appellant Robert A. Levy filed the instant employment discrimination action against the Regents of the University of California and some of its employees under the California Fair Employment and Housing Act (FEHA) (Gov. Code Sec. 12900 et seq.)

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[1]Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts VII and VIII.

and the federal Age Discrimination in Employment Act (ADEA) (29 U.S.C. Sec 621 et seq.). Appellant claims discrimination in hiring based on age. A summary judgment was entered against appellant by the trial court on respondents' motion. Thereafter, appellant's motions for reconsideration and a new trial were denied. Appellant appeals from the summary judgment and the orders denying his motions for reconsideration and a new trial.[1] We affirm.

I

Appellant was born in El Paso, Texas, on November 15, 1926. He received a Ph.D in physics in 1955 from the University of California at Berkeley. After a series of

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[1]The order denying appellant's motion for a new trial is not an appealable order. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, Sec 92, p. 113.)

jobs in the private sector, he secured a position as associate professor of physics at the University of Cincinnati from 1963 to 1969. However, upon being denied tenure in 1969, he left the university.

Three years before leaving the university, and shortly after turning 40, appellant began an ongoing effort to obtain a faculty position at another educational institution. His search included various campuses of the University of California. However, his efforts were without success. From the time he left the University of Cincinnati in 1969 to the time he filed the instant lawsuit in 1982, appellant remained unemployed in his chosen field.

The events giving rise to the litigation herein occurred in 1980 and 1981. In the spring of 1980, approximately 11 years after appellant

left the University of Cincinnati, appellant's daughter, then a student at the University of California, Davis campus, approached the chairman of that school's physics department, Dr. Douglas McColm, and asked him to consider appellant for employment. Due to this request, McColm telephoned appellant who was living in Texas at the time, and discussed temporary lecturer positions with him. The qualifications for a temporary lecturer position included an advanced degree in physics, teaching experience and, usually, immediate availability. McColm explained the nature of such positions, that they were nonfaculty positions lasting only one quarter, that they came open on very short notice and were, thus, usually offered to members of the local physics community in Davis who were capable of going to work on

short notice. Appellant indicated that he "might" be interested in such a position whereupon McColm invited him to give a one-hour lecture on campus the following month, a time when appellant planned to be on campus anyway to attend his son's graduation.

On the day of the lecture, in June 1980, appellant met with Dr. William Knox, who was about to succeed McColm as chairman of the physics department at Davis. Knox informed appellant that the earliest a temporary lecturer position would become available would probably be the winter quarter commencing in January 1981. According to Knox, he asked appellant if he would be interested in such a position on short notice and appellant, once again, indicated that he "might" be interested. Appellant claims that Knox "promised" him the position on

the spot, before appellant had given his lecture and prior to Knox becoming chairman of the department.

Appellant's lecture apparently consisted of a review of two articles he had published 20 years earlier plus an informal theoretical analysis of a mileage device which he did in 1977. Neither Knox nor McColm were impressed by the lecture according to their later statements.

Following appellant's talk, appellant did not personally follow upon the temporary lecturer position which had been mentioned by Knox. Accordingly, Knox said he forgot about appellant as a possible candidate and when in November or December 1980 a sudden need arose for a temporary lecturer for the January 1981 quarter, he considered only applicants in the local physics community. Knox attached little importance to the fact that appellant gave

a guest lecture in the physics department as such talks by visitors took place, on an average, three times a week. On December 22, Knox recommended that the position be filled by 30-year-old Michael Madison who had received his master's degree in physics from Davis and was a doctoral candidate in the department. Madison had also been a teaching assistant at the university the previous year and had received outstanding reviews on his skills as a lecturer.

In January 1981, appellant personally contacted Dr. Knox about the temporary lecturer position at which time he was informed that the position had been filled. Failing to get the temporary lecturer position at Davis, appellant continued to pursue other positions at the University of California. In May 1981, appellant saw an advertisement in Science

magazine advertising the position of deputy director for the university-wide energy research group, headquartered in Berkeley. Qualifications noted by the advertisement included a Ph.D. or "equivalent" plus substantial research experience in and energy-related field. Additionally, the advertisement indicated that experience in the management of research programs and with information systems "is very desirable." The notice instructed potential applicants to send curriculum vitae and three letters of reference by June 1, 1981, to the university in care of Professor Jack M. Hollander. Appellant responded to the ad with a resume and letter wherein he stated that he would be unable to supply letters of recommendation by the June 1 deadline "primarily because I have been unemployed for the last dozen years and most of the

people from who I would ask letters of recommendation are retired." Appellant said he would comply with the "requirement" for letters "if you wish to consider my application."

Eighteen other individuals besides appellant applied for the deputy director position. The applications were reviewed by Dr. Hollander who ranked the applicants in five categories ranging from very strong to very weak. The three top ranked candidates were: Dr. Larry Icerman, Dr. Harvey Leff, and Dr. Michael Lederer. Icerman's qualifications included fourteen years of continuous professional academic experience including extensive experience in the field of solar and geothermal energy, co-authorship of three textbooks and authorship or co-authorship of fifty-six notes, papers and reports dealing primarily with energy resources. He

currently held the position of director of the New Mexico Energy Institute. Dr. Leff, meanwhile, had eighteen years of continuous experience in physics and had authored or co-authored five energy-related works. Finally, Dr. Michael Lederer who was temporarily filling the deputy director slot while the application and selection process was pending, had twenty years of professional experience nearly all at the Lawrence Berkeley Laboratory, including experience as the department head for information and data analysis. Additionally, Lederer had authored or co-authored thirty-one publications. Of the five categories of candidates, appellant was ranked in the lowest category.

Dr. Hollander eventually recommended 43-year-old Dr. Lederer for the position. Dr. Hollander said that in addition to

Lederer's superior credentials, he was impressed with the applicant's work as acting deputy director for the group. Hollander's recommendation was approved.

On June 19, 1981, appellant filed the first of two administrative complaints with the California Department of Fair Employment and Housing (DFEH). In this initial complaint, appellant alleged that the physics department at Davis had discriminated against him on the basis of age when it failed to hire him as a nonfaculty temporary lecturer for the winter quarter in January of 1981. Appellant based this charge on an alleged promise by both Drs. McColm and Knox to hire him for the winter quarter and on an earlier letter he received in 1979 from the statewide assistant vice president for academic personnel, Edward Blakely, wherein it was allegedly stated,

"Apparently there is a real glut of young Ph.D. physicists and the competition for every post is intense." (Emphasis added.) Following an investigation into these allegations, the department advised appellant by letter that it would not be pursuing the matter because there was "[i]nsufficient evidence to prove a violation of the statute."

Appellant filed a second complaint with the DFEH on March 22, 1982, alleging that the University of California had discriminated against him on the basis of age by failing to hire him for the deputy director position. Appellant based this complaint on the fat that Dr. Hollander had not responded to his application and the fact that he had been unsuccessful in seeking employment at the university for the past 15 years, "since I first made application in 1966, just after my 40th

birthday." Once again, the department found insufficient evidence to support the charge and advised appellant accordingly.[2]

Following the DFEH's action on both complaints, appellant filed the instant lawsuit alleging discrimination in hiring based on age in violation of the FEHA (Gov. Code, Sec 12900 et seq.[3]) and the

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[2]Complaints lodged with the Equal Employment Opportunity Commission (EEOC), the federal agency designated to handle ADEA claims, were also apparently rejected by that agency.

[3]Former Labor Code section 1420.1 provided: "It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action." Labor Code sections 1410 through 1433, the Fair Employment Practices Act, were repealed by Statutes 1980, chapter 992, section 11, page 3166, and incorporated into the FEHA. They are now found in Government Code section 12900 et seq.

federal ADEA (29 U.S.C. Sec 621 et seq.[4]). The suit was filed against the Regents of the University of California, the University of California at Davis, the University of California at Berkeley, Drs. McColm, Knox and Hollander, and Edward Blakely. Service of the complaint on respondents, however, did not take place until two years later. This appeal followed the granting of respondents' motion for summary judgment.

II

The first issue on appeal concerns the propriety of the trial court's action

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[4]The pertinent part of the ADEA provides: "It shall be unlawful for an employer -- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; .." (29 U.S.C. Sec 623, subd. (a).) State courts have jurisdiction over private-sector ADEA cases. (Lehman v. Nakshian (1981) 453 U.S. 156 164, fn. 12.)

in granting respondents' motion for summary judgment. Summary judgment is authorized by Code of Civil Procedure section 437c, subdivision (c), which provides, in relevant part, that a motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The basis for review of a summary judgment has been stated by our Supreme Court as follows: "'"The matter to be determined by the trial court in considering such a motion is whether the defendant (or the plaintiff) has presented any facts which give rise to a triable issue. The court may not pass upon the issue itself. Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to

sustain a judgment in his favor and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue. The aim of the procedure is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing procedures of a trial. In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. Such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts."' [Citation.]" (Empire West v. Southern California Gas Co. (1974)

12 Cal 3d 805, 808.)

III

To guide us in our analysis of appellant's claims under both the FEHA and the ADEA, we look at federal law and how claims under title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec 2000e to 2000e-17) are broached. (See Ibarbia v. Regents of University of California (1987) 191 Cal.App.3d 1318, 1326-1327, hg. den. July 29, 1987; and Williams v. Edward Apffels Coffee Co. (9th Cir. 1986) 792 F.2d 1482, 1484.) Claims of employment discrimination because of an individual's race, color, religion, sex or national origin may be pursued under title VII in one of two ways: "An individual may allege that he has been subjected to 'disparate treatment' because of his [protected status], or that he has been a victim of a facially neutral practice having a

'disparate impact' on [those sharing the same protected status]." (Furnco Construction Corp. v Waters (1978) 438 U.S. 567, 582.) To overcome respondents' motion for summary judgment, under either theory, appellant has to offer facts sufficient to establish a prima facie case. (McDonnel Douglas Corp. v. Green (1973) 411 U.S. 792, 802; Griggs v. Duke Power Co. (1971) 401 U.S. 424, 431.)

To establish a prima facie case of employment discrimination through disparate treatment under title VII, a plaintiff must offer evidence that "give[s] rise to an inference of unlawful discrimination." (Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248, 253, fn. omitted.) A common way to establish this inference is to show that the four requirements set forth in McDonnell Douglas are met: (1) that the

plaintiff belongs to a protected class, (2) that the plaintiff applied and was qualified for a job for which the employer was seeking applicants, (3) that, despite being qualified, the plaintiff was rejected, and (4) that, after the plaintiff's rejection, the position remained open and the employer continued to seek applications from persons of comparable qualifications. (McDonnel Douglas Corp. v. Green, supra, 411 U.S. at p. 802.)

The elements of a prima facie case under the ADEA are similar to those set forth in McDonnell Douglas for title VII cases. Under the ADEA, a plaintiff must demonstrate that (1) he was a member of the protected age group of individuals between 40 and 70 years of age, (2) he applied for but did not receive the position in question, (3) another person

of similar qualifications generally outside the protected age group, received the particular position, and (4) the claimant was qualified to fill the position he sought. (Fugate v. Allied Corp. (N.D. Ill. 1984) 582 F.Supp. 780, 783; see also Sakellar v. Lockheed Missiles and Space Co. (9th Cir. 1985) 785 F. 2d 1453, 1455.)

"If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory." (Lowe v. City of Monrovia (9th Cir. 1985) 775 F.2d 998, 1005.)

To establish a prima facie case of

employment discrimination through disparate impact, on the other hand, a plaintiff need not prove intentional discrimination. However, he must prove circumstances raising an inference of discriminatory impact, plus the discriminatory impact at issue. "This is usually done by establishing 'that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants.' [Citation.]" (Lowe v. City of Monrovia, supra, 775 F. 2d at p. 1004.) "[T]he requirements in a disparate impact plaintiff must meet ' are in some respects more exacting than those of a disparate treatment case.....' [Citations.]" (Ibid.)

IV

In the instant case, appellant meets some of the pertinent elements for

establishing a prima facie case of employment discrimination through disparate treatment under the ADEA. At the time he applied for both the temporary lecturer position and the deputy director position, he was over 40 and thus, belonged to a protected class. Additionally, the person hired for the temporary lecturer position was not only younger than appellant but generally outside the protected age group. Nevertheless, it is clear that appellant falls way short of meeting all of the necessary elements.

As to the temporary lecturer position at Davis, it cannot be said, based on the undisputed facts of the case, that appellant effectively "applied" for the position. In June 1980, when appellant gave his informal lecture on campus at the request of the chairman of the physics

department, appellant was told that there were no temporary lecturer openings at the time and that the earliest such opening would likely occur in the upcoming winter quarter which would begin January 1981. Appellant was also told how these openings characteristically came up -- i.e., that they came up on "very short notice" and usually were offered to members of the local physics community who were capable of going to work on such short notice. Knowing these facts, appellant nevertheless failed to personally follow up on this position until January 1981, an untimely action by anyone's definition. By January 1981, the opening had already been filled.

The importance of completing the application process in order to establish a prima facie case of discrimination by disparate treatment was noted by this

court recently in the case _Ibarbia v Regents of University of California, supra_, 191 Cal.App.3d 1318. In that case, Ibarbia, a Filipino-American, applied for the position of farm advisor which had been advertised by the University of California division of Agricultural Services. Upon learning that he had not been chosen as one of the finalists, Ibarbia wrote the university personnel administrator, informing him that he viewed the rejection of his application as another instance of the university's continuing discrimination against Filipino-Americans. Based on the letter, the university launched an investigation wherein it was discovered that the criteria used by the committee in charge of screening the applications differed from the qualifications which had been listed in the job announcement. Based on

this discrepancy, the university contacted Ibarbia by phone, offering him an interview for the position. Ibarbia, however, declined the interview in view of the fact that he had filed a complaint with the EEOC and, consequently, did not believe the interview would be fair.

Ibarbia then brought suit against the university under the FEHA alleging discrimination based on national origin. A summary judgment was granted by the trial court and upheld by this court which found that since Ibarbia had declined the proffered interview, he had failed to complete the application process and "to make the required showing as a matter of law." (Ibarbia v. Regents of University of California, supra, 191 Cal. App.3d at p. 1329.) Ibarbia's claim that the interview was merely a pretext and that the selection of a candidate had already

taken place was determined to be nonconsequential inasmuch as the claim was "purely speculative and unsupported by the evidence.") (Ibid.)

As in Ibarbia, appellant here has failed to establish a prima facie case of discrimination by disparate treatment relative to the temporary lecturer position at Davis, as a matter of law, because he did not complete the application process by following up on his initial inquiry. There is nothing in the record to indicate that he ever informed the university that he had made a definitive decision that he wished to be appointed to the position. Having stated that he "might" be interested in the position, appellant failed to communicate with the university, either orally or in writing, during the critical months leading up to the winter quarter. An

employer does not have an obligation to give notice of an opening to all potential applicants who have expressed an interest in the position.

Nor does the fact that there was evidence that appellant's daughter dropped by the department in December 1980 to remind Dr. Knox of appellant's interest, alter our view. First of all, it can hardly be argued that her informal visit was tantamount to a completion of the application process by appellant. Furthermore, it would appear from the record that even his daughter's visit was untimely. Appellant's daughter visited the department prior to leaving campus for Christmas vacation at a time when Dr. Knox had already reviewed local candidates. The selection of the temporary lecturer was made on December 22.

Finally, as in Ibarbia, appellant's

attempt at overcoming the weakness of his showing by alleging its use by the university as a mere pretext to camouflage its real discriminatory motive in not hiring him, must fail as well. Allegations made by appellant in this regard -- i.e., that the person hired for the position was less qualified than he, that during the period in question the university had more than one temporary lecturer opening -- are purely speculative and not borne out by the evidence.

Appellant's claims of discrimination by disparate treatment relative to the deputy director position at Berkeley must fail on the same basis. Appellant did not complete the application process relative to this position. The university's notice advertising the position specifically instructed potential applicants to make application by sending curriculum vitae

and three letters of reference. Appellant submitted his resume but did not include any letters of reference. Nor was it his intention to supply them at a later time absent another request by the university. Under these circumstances, appellant has failed to establish a prima facie case of employment discrimination as a matter of law.

Neither does the fact that the university considered appellant's application in spite of these deficiencies, lend support to his position. In establishing a prima facie case of employment discrimination, it is incumbent upon appellant to establish that he did everything that was required of him as an applicant and met all the qualifications of the position in question, but still was not hired. Only in this way is the inference of

discrimination raised. When appellant fails to meet this burden, as here, discrimination cannot be inferred because there are other equally, if not more, plausible bases for his rejection. The fact that the employer nevertheless decides to review his application, does not cure the weakness of appellant's case.

Moreover, relative to the deputy director position, in addition to failing to establish that he had effectively applied for the position, appellant has also failed to establish (1) that he was, in fact, qualified for the position, and (2) that another person of similar qualifications outside the protected age group received the position. Accordingly, he is unable to claim a prima facie case of employment discrimination on this basis. Among the qualifications for the deputy director position, "experience in

management of research programs and with information systems" was listed as "very desirable." Nowhere in appellant's resume is such experience noted. Forty-three-year-old Dr. Lederer who was eventually chosen for the position, on the other hand, had experience as department head of information and data analysis at the Lawrence Berkeley Laboratory as well as temporarily filling the deputy director slot itself. In addition, it is beyond question that Dr. Lederer's qualifications were superior in all respects to those of appellant.

For these reasons, we find that appellant has not established a prima facie case of employment discrimination by disparate treatment as to either the temporary lecturer position at Davis or the deputy director position for the university-wide energy research group.

V

Nor has appellant succeeded in presenting a prima facie case of employment discrimination under the theory of "disparate impact" with respect to either the temporary lecturer position or the deputy director position. It will be remembered that in order to make the required showing, appellant had to not only prove circumstances raising an inference of discriminatory impact, he also had to prove the discriminatory impact at issue. (Lowe v. City of Monrovia, supra, 775 F.2d at p. 1004.)

Throughout his papers, appellant implies that the university practices a discriminatory policy in its hiring procedures, favoring younger applicants over older applicants. However, appellant provides no evidence, either direct or indirect, to support such an allegation.

What evidence there is, in fact, suggests otherwise. Appellant, for instance, provides statistical data on the ages of temporary lecturers hired by the physics department at the University of California at Davis between 1975 and 1982, plus age data on the academic faculty hired by that department between 1979 and 1981, and finally, age data relative to all professors and permanent lecturers at both the Davis and Berkeley campuses as of 1982. Nothing in this data points to the kind of discriminatory policy alleged by appellant.

VI

The approach followed by the California Fair Employment and Housing Commission (Commission) which hears FEHA cases, resembles the federal approach. It too has adopted the disparate treatment/disparate impact theories of

employment discrimination. The primary difference is on that does not concern us in our case. Under the Commission's approach, in order to establish a prima facie case of disparate treatment, a complainant must show that a causal connection exists between his protected status and the adverse employment decision. "The Commission has stated that this causal connection or nexus can be proved by establishing facts that create an inference of discrimination, as in McDonnell Douglas Corp. v. Green, or by a showing of actual bias against complainant's group, or by other competent evidence. [].....Thus the Commission's position is that McDonnell Douglas Corp. v. Green sets out but one way of raising an inference of discrimination." (Gelb & Frankfurt, California's Fair Employment and Housing Act: A viable State Remedy for

Employment Discrimination (1983) 34 Hastings L.J. 1055, 1070, fns. omitted.)

In the instant case, it is apparent that appellant has failed to make a sufficient showing of disparate treatment or disparate impact under either the federal approach or the one adopted by the Commission. As to both of the positions at issue, appellant failed to complete the application process. As to the deputy director position, appellant was lacking in qualifications. Nor is it possible, as a result, for him to establish a causal connection between his protected status and the adverse employment decisions.

VII[1]

As the next issue on appeal, appellant seeks review of numerous rulings by the trial court concerning certain

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[1]Part VII of this opinion is not certified for publication. (See fn., ante, p. 1.)

pretrial discovery matters. In particular, appellant seeks review of court orders relative to his motion to compel answers to interrogatories; his subsequent motion to compel compliance with the court's order therein plus a request for sanctions; his motion to compel the further production of documents; and his motion for sanctions in connection with the depositions of respondents McColm and Knox, and witness Mary Schenck. Before delving into appellant's specific contentions regarding these rulings, however, some background information is in order.

Interrogatories

Appellant served a set of written interrogatories on respondents McColm, Knox, Blakely and Hollander. Respondents answered some of the interrogatories but refused to answer others. Among the

interrogatories respondents refused to answer were those seeking information relative to their personal lives such as: home addresses, social security numbers, names of spouses, salaries, military background, educational and employment backgrounds, and whether or not they had worked for the Federal Bureau of Investigation or the Central Intelligence Agency. Respondents objected to these questions on the grounds that they violated the right of privacy of themselves and/or third parties, or they were irrelevant, overbroad and unduly burdensome, or harassing.

Appellant moved the trial court for an order compelling respondents to answer these questions. The trial court denied the motion in most respects. However, it did order respondent Knox to specifically address certain parts of an interrogatory

concerning persons hired as temporary lecturers at the UCD physics department during the 1980-81 summer/fall/winter quarters.

Thereafter, appellant moved the court to compel compliance with the above order and to award him sanctions on the grounds that Knox did not fully comply with the subject order. This motion was denied.

Documents

Appellant filed a request for the production of certain documents. Respondents refused to produce some of the requested documents claiming they were privileged and that the requests, once again, were overbroad and unduly burdensome. Appellant then moved the court to compel the production of these documents. The trial court granted the motion in part and denied the motion in part. At a hearing on the motion,

appellant the court that he was satisfied with its ruling except as regards the part which "allowed the defendant to introduce certain evidence in camera." As to this part of the ruling only, appellant objected.

The part of the ruling to which appellant objected concerned the first item in appellant's request: "All files and all the documents therein, including but not limited to personnel and applicant files on plaintiff Robert A. Levy, which include any of the following: [] (a) plaintiff's resumes; (b) plaintiff's job applications; (c) correspondence or memoranda by, to or concerning plaintiff which relate to his consideration for employment by defendants." In its ruling, the trial court granted the request "except that as to those documents which defendant considers confidential, a

summary is to be prepared and submitted with the original to the court for an in camera inspection."

Deposition

In a "notice of deposition," appellant requested that respondent university produce a witness who could testify "concerning records in the possession of [the university] pertaining to plaintiff and concerning any opinions or information held by [the university] or its agents pertaining to plaintiff, his background, qualifications, or his biography...." In response to this, the university made available Mary Schenck, custodian of records for the physics department at Davis, and Linda Dayce, the custodian of records for the Energy Research Group at Berkeley. Appellant took the deposition of Schenck but when she testified that the only records in the

department's files concerning appellant was his biography, appellant terminated the deposition. Thereafter, appellant refused to take the deposition of Dayce.

Appellant then filed a motion for sanctions on the grounds that the university had failed to produce witnesses "capable of testifying concerning the information designated in plaintiff's notice of deposition." The motion was also based on alleged "interference and harassment" by respondents' attorneys during appellant's deposition of respondents McColm and Knox. Appellant's motion for sanctions was denied by the trial court.

Discussion

Appellant claims an abuse of discretion on the part of the trial court in its disposition of the foregoing motions. He asserts that as a result of

the trial court's rulings, discovery was unduly restricted for him thereby impairing his ability to build his case. We find no abuse of discretion whatsoever.

It is well settled that "the trial court has broad discretion in ruling on motions to compel discovery. [Citations.] This exercise of discretion will not be reversed on appeal unless it has been manifestly abused and where the facts justifying discovery are clear." (Sawyer v. First City Financial Corp. (1981) 124 Cal.App.3d 390, 409.)

"'[T]he showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial

judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice.' [Citations.]" (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, Sec 275, p. 286.)

We find neither an abuse of discretion on the trial court's part relative to the subject rulings, nor anything to even approximate a miscarriage of justice. As to appellant's interrogatories, the right of privacy and overbreadth objections raised by respondents were properly ruled upon by the court. The pertinent parts of those interrogatories were answered. As to the court's ruling regarding appellant's request for documents, appellant waived any objections to this ruling at the

November 13 hearing, except for the part of the ruling which provided for an in camera inspection of certain documents by the court. As to this, we find the trial court's actions more than fair. Furthermore, we note that, relative to appellant's motion to compel the production of documents, it is clear from the transcript from the November 13 hearing, that the trial court bent over backwards to accommodate appellant and his request. Finally, as to appellant's motion for sanctions relative to the depositions, we find no merit either. As pointed out by respondents in their brief, it appellant wished to depose a system-wide custodian of records, as he now claims, he should have so indicated in his notice of deposition and this he did not do.

VIII[1]

Appellant's final contention on appeal is an abuse of discretion on the trial court's part in the denial of his motion to tax costs. Following judgment in their favor, costs were awarded to respondents in the sum of $823.80. Out of this, $809.80 represented the amount charged respondents by the court reporter in transcribing the deposition of appellant and in providing respondents with copies of the depositions of appellant, McColm, Knox and Schenck. In his motion to tax costs, appellant claimed that these costs were excessive particularly as regards those for photocopying the subject depositions. We find no abuse of discretion in the trial court's ruling.

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[1]Part VIII of this opinion is not certified for publication. (See fn., ante, p.1.)

"The statutes declare the fundamental principle that the successful party is entitled to costs in the usual types of actions. [Citations.]" (7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, Sec 88, pp. 523-524.) "A party may recover the reasonable cost of taking depositions as well as the cost of one copy of each deposition, unless it appears to the court that the deposition was unnecessary. [Citations.]" (Op. cit. supra, Sec 110, p. 541.)

"The necessity for a deposition and for the related expenditures is a question for the trial court's sound discretion. [Citation.] The burden of proof that the deposition was unnecessary or that the costs of taking the deposition were unreasonable is on the party seeking to have that item taxed or reduced. [Citation.]" (County of Kern v. Ginn

(1983) 146 Cal.App.3d 1107, 1113.)

No colorable claim can be made that the subject depositions were unnecessary to respondents in the preparation of their defense. As to the costs of these depositions, appellant's point that the court reporter's charges for photocopying in this instance are higher than those he was able to negotiate for himself, is unpersuasive. As pointed out by the trial court, the costs reflect not only the cost of photocopying but also the cost of the court reporter's services.

IX

Summary judgment is affirmed as is the trial court's order denying appellant's motion for reconsideration.

CERTIFIED FOR PARTIAL PUBLICATION.

_____

Merrill, J.

We concur:

_____

White, P.J.

_____

Barry-Deal, J.

Trial Court: Superior Court
Alameda County

Trial Judge: John Sutter

Counsel for Appellant:

Robert A. Levy, in pro. per
1617-D N. Mesa Street
El Paso, TX 79902-3527

Counsel for Respondents:

Michael J. Loeb
James C. Martin
Kathy M. Banke
Crosby, Heafey, Roach & May
Professional Corporation
1999 Harrison Street
Suite 2500
Oakland, CA 94612

A036046
Levy v. Regents of the University of California et al.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION 3

LEVY, ROBERT A.
vs
REGENTS OF THE UNIVERSITY OF CAL., ET AL
A036046
Alameda County No. 5656958

BY THE COURT:

The petition for rehearing is denied.

FILED
APR 29, 1988
Court of Appeal - First App. Dist.
RON D. BARROW

Dated: APR 29, 1988 WHITE, P.J.

B.1

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 3, No. A036046
S005552

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

LEVY

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al

Appellant's petition for review DENIED

FILED

JUNE 22, 1988

LUCAS

Chief Justice

C.J

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

San Francisco District Office
10 United Nations Plaza
San Francisco, California 94102
Telephone 415-556-1827

Robert A. Levy
1617 North Mesa Street
El Paso, Texas 79902

Charge No. 091813061

RE: LEVY/University of CA-Davis

Dear Mr. Levy:

This is to inform you that the Commission has discontinued it processing of your charge under the Age Discrimination in Employment Act (ADEA) because efforts to settle your charge under Section 7(d) of ADEA were unsuccessful.

The fact that the Commission will take no further action does not affect your right to take legal action on your own behalf nor does it preclude further investigation activity by this agency to

D, 1

determine the firm/organization's compliance with the ADEA. The Act provides that a private lawsuit in federal district court may be filed by an individual any time after the expiration of 60 days form filing a charge. The Act provides further, that a two-year limitation period is imposed on recovery of unpaid compensation (three years in the case of a willful violation). The applicable statute of limitations in any specific case is a matter for the Courts to decide.

Sincerely yours,

Frank A. Quinn
District Director

Date: Oct 04 1982

cc: University of CA-Davis

State of California-State and Consumer Services Agency
Edmund G. Brown, Jr. Governor
Department of Fair Employment & Housing
1201 I Street, Sacramento, CA 95814
(916) 445-9918

May 19, 1982

Robert A. Levy
1617 North Mesa St.
El Paso, Texas 79902

FEP 80-81 E7-0734ae
LEVY/University of CA-Davis

Dear Mr. Levy:

As District Administrator of the Department of Fair Employment and Housing office where you have filed a complaint of discrimination against the above-named respondent, I have received from the consultant assigned to your case a recommendation to close it. I have reviewed your case and have approved the assigned consultant's recommendation. Your case has been closed, effective the date of this letter, on the basis of: Insufficient evidence to prove a violation of the statute.

Since the Department will not be

pursuing an accusation in your case, you have the right to file a private lawsuit in a California Superior Court. If your DFEH complaint was filed more than 150 days prior to this notice, you have already received a letter informing you of your right to sue and have one year from the date of that letter to file suit. If your complaint has not been open more than 150 days, you have one year from the date of this letter to file suit. (Refer to California Government Code section 12965(b) for employment complaints and section 12980(d) for housing complaints.)

In the event a settlement agreement was signed, it is likely that you have waived your right to pursue the complaint in Superior Court.

Sincerely,

George Macias, District Administrator
GM:llj
cc: Dennis Shimek, Assist. Vice Chancellor
University of CA-Davis, 212 Mrack Hall
Davis, CA 95616
DFEH-200-08 (11/81)

D.4

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

San Francisco District Office
10 United Nations Plaza
San Francisco, California 94102
Telephone 415-556-5319

May 19, 1982

Robert A. Levy
1617 North Mesa Street
El Paso, Texas 79902

RE: CHARGE No. 091823716

Dear Mr. Levy,

The Equal Employment Opportunity Commission (EEOC) has received and filed a copy of your age discrimination charge, filed previously with the state agency. Unless you request otherwise, we plan no action regarding your charge under the Federal Age Discrimination in Employment Act (ADEA).

The ADEA requires, as a prerequisite to a private lawsuit, that a charge alleging discrimination be filed with the EEOC and an appropriate state agency. Thus, the

D.5

EEOC's receipt and filing a copy of your charge preserves your private suit rights.

In order to avoid any misunderstanding, please note that anyone wishing to file a private suit under the ADEA must do so within two (2) years of the date of the alleged discriminatory action (3 years in cases of willful violations). You are free to file a private suit at any time after the expiration of sixty (60) days from the date the charge was received by this agency, notwithstanding any action by the Commission or the state agency.

If you have any questions regarding our handling of this charge or the application of the ADEA, please call us at (415) 556-5319.

Sincerely,

INTAKE UNIT SUPERVISOR

State of California-State and Consumer Services Agency
Department of Fair Employment & Housing
1111 Jackson Street, Oakland, CA 94607
(415) 464-4095

November 8, 1982

Robert A. Levy
1617 North Mesa St., "D"
El Paso, Texas 79902

Re: FEP 81-82 M8-0434ae
LEVY/University of California
EEOC # 091823716

Dear Mr. Levy:

The Consultant assigned to handle subject discrimination complaint which you filed with the Department of Fair Employment and Housing has recommended that the case be closed on the basis of INSUFFICIENT EVIDENCE TO PROVE A VIOLATION OF THE STATUTE.

Please be advised that this recommendation has been accepted and your case has been closed effective the date of this letter.

Since the Department will not be pursuing an accusation in your case, you have the right to file a private lawsuit in a

California Superior Court. If your DFEH complaint was filed more than 150 days prior to this notice, you have already received a letter informing you of your right to sue within one year from the date of that letter. If your complaint has not been open more than 150 days, you have one year from the date of this letter to file suit. (Refer to California Government Code section 12965(b) for employment complaints and section 12980(d) for housing complaints.)

In the event a settlement agreement was signed, it is likely that you have waived your right to pursue the complaint in Superior Court.

Sincerely,

Rudolph C. Portis
District Administrator
RCP/MMF/jas

cc: Lola H. Harris, Assistant Chancellor
University of California
200 California Hall
Berkeley, CA 94720

DFEH-200-08 (03/82)

D.8

Science magazine, Volume 212, Page 705

May 8, 1981

UNIVERSITY OF CALIFORNIA, BERKELEY,

UNIVERSITYWIDE ENERGY RESEARCH GROUP.

Research Series (academic nonsenate) position to act as DEPUTY DIRECTOR of the group. Assist the director in the management of the group, and act on his behalf when requested. Qualifications include a Ph.D or equivalent plus substantial research experience in an energy-related field; experience in the management of research programs, and with information systems, is very desirable. Less than 100 percent (but not less than 50 percent) time; allows for research or teaching in an energy-related field. Salary range $32,900 to $47,800 per year (full-time equivalent), depending on qualifications. Continuing position, subject to continued funding. Applicants

E.1

should send curriculum vitae and three letters of reference by 1 June 1981 to: Professor Jack M. Hollander, Universitywide Energy Research Group, Building T-9, Room 216, University of California, Berkeley, Calif. 94720. The University of California is an Equal Opportunity/Affirmative Action Employer

Received May 13, 1981
J.M. Hollander

May 9, 1981

Professor Jack M. Hollander
Universitywide Energy Research Group
Building T-9, Room 216
University of California
Berkeley, CA 94720

Dear Professor Hollander:

I am writing to apply for the position of Deputy Director of the Universitywide Energy Research Group, as advertised in the May 8 issue of Science magazine. Enclosed is a resume of my background, but I doubt that I would be able to get letters of recommendation to you by June 1, primarily because I have been unemployed for the last dozen years and most of the people from whom I would ask letters of recommendation are retired.

However, I would be interested in learning more about the position, and if

you wish to consider my application, I would try to comply with the requirement for letters or otherwise obtain the information you need.

Sincerely yours,

Robert A. Levy

1617-D N. Mesa St.

El Paso, TX 79902

(915) 533-6413

Biographical Resume - Robert A. Levy

Birthplace, El Paso, Texas, 15 November 1926

Married 1956, 4 children, ages 16 to 22

Primary and Secondary education in public schools of El Paso, Texas

University of Texas (Austin): B.S. (physics) 1947; M.A. (mathematics) 1948

University of California (Berkeley): M.A. (physics) 1950: PhD (physics) 1955

Employment

1950-53 U.S. Naval Radiological Defense Laboratory, San Francisco, CA, technician, solid state dosimetry

1955-57 Texas Instruments Inc. Dallas, TX, physicist, semiconductor devices

1957-59 Motorola Inc. Phoenix, AZ, project engineer, semiconductor devices

1959-60 Hughes Aircraft Co, Newport

Beach, CA, physicist, magnetic resonance

196k-62 National Radio Co, Melrose, Mass, physicist, quantum electronics

1962-63 Israel AEC, Yavne, Israel, visiting fellow, magnetic resonance

1963-69 University of Cincinnati, Cincinnati, O. associate professor of physics

1969-present - Unemployed

Principal Publications

1968 Principles of solid state physics, Academic Press, New York

1965 Silicon tunable maser, U.S. Patent 3,223,932 (Dec. 14, 1965)

1960 Resonant spin-spin interactions in silicon, Phys.Rev.Letters 5, 425, (1960)

1955 Investigations of metal-ammonia solutions by EPR, Phd thesis topic, Phys Rev 102, 31 (1956)

1953 Electronic Structure of f-centers

(with A.F. Kip, C. Kittel, and A.M. Portis) Phys Rev. 91, 1066 (1953)

1951 Dosimetry by radiophoto-luminescence, (with R.S. Alger, J.H. Schulman, R.J. Ginther, and C.C. Klick) Jour App Phys 22, 1479 (1951)

Military Service--U.S. Naval Reserve, 1944-72

Enlistment, 25 April 1944

Commissioned, 2 June 1947

Final rank, Lieutenant Commander, 1958

Retirement, 30 June 1972

References

C. Kittel, University of California, Berkeley

A.F. Kip, University of California, Berkeley

Dale Jones, University of Cincinnati, Cincinnati, Ohio

Activities since 1969

Survival experiments in semi-primitive environment, 1969-76

Miscellaneous articles for encyclopedias, 1969-72

Do-it-yourself remodeling and conversion of family homestead to multi-family residence, 1970-73

Do-it-yourself overhauling and maintenance of family vehicles, 1969-79

Energy conservation activities, 1972-79

Activities publicizing fraudulent nature of devices purporting to achieve fuel economies which violate laws of thermodynamics, 1977-79.

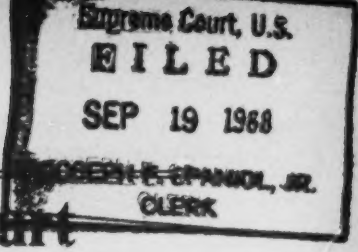
Address: 1617-D N. Mesa St, El Paso, TX

Telephone: (915) 533-6413

(2)

88-425

No.



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ROBERT A. LEVY,
Petitioner,

VS.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
UNIVERSITY OF CALIFORNIA, DAVIS,
UNIVERSITY OF CALIFORNIA, BERKELEY,
PROFESSOR DOUGLAS MCCOLM,
PROFESSOR WILLIAM KNOX,
EDWARD J. BLAKELY,
PROFESSOR JACK M. HOLLANDER,
in their individual and official capacities,
and DOES I-XXX,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California First Appellate District, Division Three

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER W. DAVIS
(Counsel of Record)
MICHAEL J. LOEB
JAMES C. MARTIN
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
1999 Harrison Street
Oakland, CA 94612
(415) 763-2000
Attorneys for the Respondent

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Did the Court of Appeal for the State of California correctly conclude that defendants are entitled to summary judgment on claims of age discrimination when a plaintiff does not make a prima facie showing of age discrimination and the defendants establish that they had legitimate, nondiscriminatory reasons for not hiring plaintiff.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are petitioner, Dr. Robert A. Levy, and respondents, Regents of the University of California, the University of California, Davis, the University of California, Berkeley, Professor Douglas McColm, Professor William Knox, Edward J. Blakely, and Professor Jack M. Hollander.

Respondents know of no other entities within the meaning of Supreme Court Rule 28.1 that should be disclosed to enable the Honorable Justices of this Court to evaluate the possibility of recusal.

JURISDICTIONAL BASIS

Petitioner asserts jurisdiction under 28 U.S.C. Section 1257(3), but no conflict in the federal law or significant federal question is presented as required by Supreme Court Rule 17.1. On the contrary, petitioner has presented a question based exclusively on the unique facts of his case that was resolved below by well-settled law. That body of law is in no way undermined by the Court of Appeal's adherence to this well-established precedent in resolving this case against petitioner.

STATEMENT OF THE CASE

The pertinent facts are set forth in the opinion of the Court of Appeal at pages A1-A48 appended to the petition.

REASONS FOR DENYING THE WRIT

The petition should be denied. It presents no novel or significant question of federal law or any bona fide conflict in the decisions of the appellate courts. The petition does not raise any novel issues because, as the Court of Appeal's cogent analysis reveals, the result is here governed by well-settled principles that are easily drawn from the relevant cases. Petitioner does not show any conflict in the controlling law because, as the Court of Appeal's well-reasoned opinion also demonstrates, there is none. Finally, as the full factual recitation reflected in the Court of Appeal's opinion also shows, despite being given every opportunity to produce what evidence he had regarding the reasons underlying the respondents' decision not to hire him:

—Petitioner *did not* make a prima facie showing of age discrimination by respondents;

—The respondents established that they had legitimate, nondiscriminatory reasons for *not* hiring petitioner; and

—There is *no* competent evidence in the record that *any* employment decision made by respondents that affected petitioner was motivated by any form of discrimination

A fair recitation of the record here accordingly reveals that this case was dismissed under unambiguous and uniform law—not

because the Court of Appeal "misperceived the evidence" or because it made some "legal error" in its reasoning process—but because petitioner had no credible evidence to support his age discrimination claims, let alone raise any inference that the respondents' hiring of two other fully-qualified individuals was a pretext for discriminating against petitioner. *See, Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973). The Court of Appeal therefore followed an unbroken line of federal and state authority in summarily terminating this case. *Id.; e.g., Cotton v. City of Alameda*, 812 F.2d 1245, 1248-1249 (9th Cir. 1987); *Palmer v. United States*, 794 F.2d 534, 537 (9th Cir. 1986); *Gray v. New England Tel. and Tel. Co.*, 792 F.2d 251, 254-256 (1st Cir. 1986); *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1459 (9th Cir. 1985); *Casillas v. United States Navy*, 735 F.2d 338, 344 (9th Cir. 1984); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983); *Douglas v. Anderson*, 656 F.2d 528, 531, 534- 535 (9th Cir. 1981); *Tagupa v. Board of Directors*, 633 F.2d 1309, 1311-1312 (1980); *also see, Ibarbia v. Regents of University of California*, 191 Cal.App.3d 1318, 1328-1329 (1987).

As both the trial and appellate courts correctly held, petitioner's unsupported intonations of "age discrimination" cannot survive summary judgment. While petitioner seeks to reargue his case for yet another time before this Court, this Court does not sit simply to resolve disputes between the litigants before it. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). The petition should accordingly be denied.

Dated: September 16, 1988

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By PETER W. DAVIS
Counsel of Record for Respondents

Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-425

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT A. LEVY,

PETITIONER,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
UNIVERSITY OF CALIFORNIA, DAVIS,
UNIVERSITY OF CALIFORNIA, BERKELEY,
PROFESSOR DOUGLAS McCOLM,
PROFESSOR WILLIAM KNOX,
EDWARD J. BLAKELY,
PROFESSOR JACK M. HOLLANDER, in their
individual and official capacities, and
DOES I - XXX,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

PETITIONER'S REPLY BRIEF

Robert A. Levy
1617-D N. Mesa Street
El Paso, Texas 79902-3527
(915) 533-6413

Petitioner pro se

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Steckl v. Motorola 703 F 2d 392 (9th Cir. 1983)	4
Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981)	10
Williams v. Edward Appfels Coffee Co. 792 F 2d 1482 (9th Cir. 1986)	4
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PETITIONER'S REPLY BRIEF

SYNOPSIS

Respondents' Opposition raised a valid point concerning this Court's discretionary authority. Petitioner addresses this matter, showing that the Opinion of the California appellate court imposes increased and unprecedented burdens on discrimination plaintiffs, thereby significantly reducing their access to the anti-discrimination statutes. Petitioner urges that this is a matter of sufficient importance to merit review by this Court on writ of certiorari.

STATEMENT OF THE CASE

The record speaks for itself as to whether or not the opinion of the Court of Appeal gives a full factual recitation of the case. Respondents' remarks concerning the factual and legal situation are mere

assertions, without substantive support. It is clear from the record that petitioner did make a prima facie showing of age discrimination, did show that respondents' articulated reasons for not hiring him were pretextual, and did present competent evidence that respondents' decisions were motivated by age discrimination.

JURISDICTIONAL QUESTIONS

Respondents correctly pointed out however, that this Court does not sit simply to resolve disputes between the litigants before it, Rice v. Sioux City Cemetery, 349 U.S. 70 (1955), and that certiorari will be granted only when there are special and important reasons therefor, as set forth in Supreme Court Rule 17.1. These points are addressed as follows:

A. JURISDICTION UNDER RULE 17.1

Under Rule 17.1(b), the Supreme Court of California decided a federal question in a way in conflict with federal courts of appeals (infra).

Under Rule 17.1(c), The Supreme Court of California decided a federal question in a way in conflict with applicable decisions of this Court (infra).

B. THE CONFLICT AND ITS CONSEQUENCES

1. DIVERGENCE IN CASE LAW AUTHORITY

Federal and state authority regarding summary judgment in discrimination cases under Title VII and ADEA does not run in an unbroken line as asserted by respondents but forms two divergent branches. One line of cases holds that summary judgment is generally precluded when plaintiff establishes a prima facie case, Haydon v. Rand, 605 F 2d

453, 455 (9th Cir. 1979), Lowe v. City of Monrovia, 775 F 2d 998, 1009 (9th Cir. 1985), Williams v. Edward Apffels Coffee Co., 792 F 2d 1482, 1486 (9th Cir. 1986), Ibarbia v. Regents of the University of California, 234 Cal.Rptr. 167, 171 (1987).

The other line of authority holds that when a defendant articulates a legitimate non-discriminatory reason for the adverse employment decision to rebut plaintiffs' prima facie case, the plaintiff must come forth with additional facts to specifically dispute such reasons in order to avoid summary judgment, Ruffin v. County of Los Angeles, 607 F 2d 1276, 1280 (9th Cir. 1979), Steckl v. Motorola 703 F 2d 392, 393 (9th Cir. 1983), Cotton v. City of Alameda, 812 F 2d 1245, 1248 (9th Cir. 1987).

2. FFFECT ON PROCEEDINGS IN INSTANT CASE

This divergence in case law

authority resulted in some confusion in the instant case. In the summary judgment proceedings it was generally conceded that petitioner had established a prima facie case, the issue being whether or not he had presented additional facts sufficient to establish an issue of pretext. The trial court granted summary judgment on this question.

By the time the case came up for consideration in the Court of Appeal, several new cases appeared reaffirming the sound doctrine that summary judgment was inappropriate when plaintiff establishes a prima facie case. Consequently, respondents concentrated on attempts to show that petitioner failed to establish a prima facie case, including introducing arguments and facts not asserted in the summary judgment proceedings.

3. UNPRECEDENTED BURDENS INTRODUCED IN APPELLATE COURT'S OPINION

The Court of Appeal, following its decision in Ibarbia, held to the view that establishment of the prima facie case is sufficient to preclude summary judgment, but it changed the standards for establishing the prima facie case. Moreover, it changed these standards to such an extent that its resulting opinion and the doctrines resulting therefrom failed to conform to either of the above-mentioned branches of authority, and introduced unprecedented burdens on a plaintiff seeking redress under the statutes.

In particular, the Court of Appeal altered the settled standards for determining the following elements of the McDonnell-Douglas model for a prima facie case: 1) The criteria for establishing whether or not plaintiff applied for the

job, 2) The criteria for establishing plaintiff's qualifications for the job, and 3) The criteria for the age of the person hired instead of plaintiff. These elements are examined individually:

a. THE APPLICATION.

The opinion introduces the notion that a plaintiff must not only apply for a job but also follow up on his application, resulting in a significant increase in the burden placed on a plaintiff. Furthermore, the opinion disregards the chilling effects of and discouragement due to past discrimination in evaluating a plaintiff's justifiable failure to complete an application, Pearson v. Furnco Construction Co, 563 F 2d 815, 818 (1977), and other cases cited in the Petition. In addition, the opinion requires not only that the plaintiff introduce facts tending to show he applied for a job, but it also

resolves all doubts concerning such evidence against the plaintiff (the non-movant in summary judgment proceedings).

b. QUALIFICATIONS

It is settled law that at the prima facie stage a plaintiff need only show that he meets the objective qualifications for the position, Foster v. Arcata Associates, 772 F 2d 1453, 1460 (9th Cir 1985). The opinion on the other hand seems to require that plaintiff's qualifications match or exceed those of the person hired (and even those of other candidates not hired), in effect placing the burden of showing pretext into the prima facie stage, and expanding that burden in the process. And any matters about which the record is silent or doubtful are resolved against the plaintiff, again placing an unjustifiable and unprecedented burden on the plaintiff.

c. AGE OF REPLACEMENT

It is settled law that a plaintiff need show only that he was replaced by someone substantially younger than he, but not necessarily outside the protected age group, C.F.R. 1625.2(a) and cases cited in the Petition. The opinion of the Court of Appeal enunciates the doctrine that a prima facie case cannot be made unless the person hired instead of plaintiff is outside the protected age group, again placing an additional burden on the plaintiff.

CONCLUSION

Thus the California Court of Appeal, by the introduction of new and unprecedented requirements, has drastically increased the burden placed on a plaintiff seeking to establish a prima facie case of discrimination, in conflict with clearly stated criteria set out by

this Court, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (burden of establishing a prima facie case of disparate treatment is not onerous).

These alterations of the criteria for establishing the prima facie case make it virtually impossible to overcome a motion for summary judgment, and if allowed to stand, will have far-reaching consequences on employment discrimination law, to the point of rendering the protective statutes meaningless.

For these reasons, petitioner prays that this Court will grant his petition for writ of certiorari.

Dated: September 27, 1988.

Respectfully submitted,

Robert A. Levy

Robert A. Levy, Petitioner
1617-D N. Mesa Street
El Paso, TX 79902-3527
(915) 533-6413